FILED

(1) 97 • 450 SEP - 9 1997

No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANE D. HILL, - - - - - - - - - *Petitioner,*

versus

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN, - - - *Respondents.*

On Petition for Writ of Certiorari
To the Kentucky Court of Appeals

PETITION FOR WRIT OF CERTIORARI

GARY L. THEURER
15005 Spring Meadow Drive
Germantown, Maryland 20767
(301) 977-5779
Counsel of Record

IVAN H. RICH, JR.
RICH & D'AMBROSIO, P.S.C.
3044 Breckinridge Lane, Suite 103
Louisville, Kentucky 40220
(502) 493-0503
Counsel for Petitioner

September 9, 1997

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

38 pp

QUESTION PRESENTED

Whether a securities industry employee who is raped by her supervisor outside work and reports the assault to her employer has waived her right to a judicial forum and must arbitrate her subsequent claims of workplace retaliation for making the report.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	5
A. This Case Presents An Important And Unsettled Question of Federal Law Requiring Prompt Resolution	5
1. The legal status of employer mandated arbitration of employment disputes is and will remain unsettled	6
2. Truly voluntary arbitration of employment disputes is being hindered	10
B. Mandatory Arbitration Is Clearly Unworkable In This Case	12
C. Hill's Claims Of Workplace Retaliation Are Not Arbitrable Because They Arise Out Of A Sexual Assault Unrelated To Her Employment	14
CONCLUSION	18
APPENDIX	1a–13a
Order of Kentucky Supreme Court Denying Discretionary Review	1a
Order of Court of Appeals Granting Petition to Modify Opinion/Denying Request for Rehearing	2a
Opinion of Court of Appeals as Modified	3a
Order of Jefferson Circuit Court Staying Action	11a
Order of Jefferson Circuit Court Dismissing Action	13a

TABLE OF AUTHORITIES

PAGE

Cases:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 34 (1974) 9

AT&T Technologies, Inc. v. *Communications Workers of Amer.*, 475 U.S. 643 (1986) 15

Cole v. *Burns Int'l Security Svcs*, 105 F.3d 1465 (D.C. Cir. 1997) 5

First Options of Chicago, Inc. v. *Kaplan*, 514 U.S. 938 (1995) 12

Fleck v. *E.F. Hutton Group, Inc.*, 891 F.2d 1047 (2nd Cir. 1989) 17

Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) ..... passim

Great Western Mortgage v. *Peacock*, 110 F.3d 222 (3d Cir. 1997) 5, 9

Mastrobuono v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) 12, 15

Mediterranean Enterprises, Inc. v. *Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983) 16

Prudential Insurance Co. v. *Lai*, 42 F.3d 1299 (12th Cir., 1994), cert. denied 116 S.Ct. 61 (1995) 9

Tracer Research Corp. v. *National Environmental Services Company*, 42 F.3d 1292 (9th Cir. 1994) 16

Volt Information Sciences, Inc. v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) 15

Periodicals:

Bompey, The Attack on Arbitration and Mediation of Employment Disputes, 13 Lab. Law. 21 (Summer 1997) 11, 13

Cooper, Where Are We Going With Gilmer?-Some Ruminations On the Arbitration of Discrimination Claims, 11 St. Louis U. Pub. L. Rev. 203 (1992) 7

Gershenfeld, Pre-Employment Dispute Arbirtration Agreements: Yes, No and Maybe, 14 Hofstra Lab. L. J. 245 (Fall 1996) 7

Periodicals—(Continued)
Gorman, The Gilmer Decision and the Private Arbitration of Public Law Disputes, 1995 U.Ill. L. Rev. 635 7
Grodin, Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer, 14 Hofstra Lab. L. J. 1 (Fall 1996) 7
Rabin, The Role of Government in Regulating the Workplace, 13 Lab. Law. 1 (Summer 1997) 7
Siegel, Changing Public Policy: Private Arbitration to Resolve Statutory Employment Disputes, 13 Lab. Law. 87 (Summer 1997) 7

Statutes:
Federal Arbitration Act, 9 U.S.C. §1 (1994) 3
Federal Arbitration Act, 9 U.S.C. §10 (1994) 13

Miscellaneous:
A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, Disp. Res. J. Oct-Dec. 1995 ..... 8, 13
EEOC Policy Statement on Mandatory Arbitration, 9 Empl. Discrimination Rep. (BNA) No. 3 at 87-92 (July 16. 1997) 6, 7, 11
U.S. Dep'ts of Labor and Commerce, Commission on the Future of Worker-Management Relations, Report and Recommendations (December, 1994) 7
U.S. Government Accounting Office, Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes, GAO/HEHS-94-17, 12 (Mar. 1994) 13
8 Empl. Discrimination Rep. (BNA) No. 12 at 372 (March 19, 1997) 9
8 Empl. Discrimination Rep. (BNA) No. 23 at 758, 778-80 (June 4, 1997) 7, 8
9 Empl. Discrimination Rep. (BNA) No. 7 at 214 (August 13, 1997) 6
9 Empl. Discrimination Rep. (BNA) No. 9 at 323-4 (August 27, 1997) 6

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANE D. HILL, - - - - - - - - - - *Petitioner*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN, - - - - - - - *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

Jane D. Hill, by counsel, petitions for a writ of certiorari to review the judgment and opinion of the Kentucky Court of Appeals in this case.

OPINION BELOW

The opinion of the Kentucky Court of Appeals is reported at Ky App., 945 S.W.2d 948.

JURISDICTION

The date of the Kentucky Court of Appeals opinion is June 21, 1996 as modified on September 20, 1996. (App. 3a)[1] The Supreme Court of Kentucky denied Hill's peti-

---

[1]App. refers to the Appendix of this petition.

tion for discretionary review on June 11, 1997. (App. 1a) This Court's jurisdiction is invoked under 28 U.S.C. 1257.

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2 provides:

> "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration of a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

STATEMENT OF THE CASE

In this case, Jane D. Hill ("Hill"), a Vice President of the investment brokerage firm of J.J.B. Hilliard-W.L. Lyons, Inc. ("Hilliard Lyons"), alleges she was raped by Executive Vice President W. William Brab ("Brab"), while both were attending a convention in New York. She reported the incident to another Hilliard Lyons Executive Vice President, James C. Stone, and Board Chairman Gilbert L. Pamplin, who gave assurances that her complaint would be promptly resolved. However, no remedial action was taken, Brab continued exercising retaliatory authority over her and her job responsibilities were reduced. (App. 4a-5a)

Hill's complaint in Jefferson County Kentucky Circuit Court contained claims of assault and battery, false imprisonment and intentional infliction of emotional distress, along with sexual harassment, retaliation and violation of the equal pay law under Chapter 344 of the Kentucky Revised Statutes. (App. 5a) Brab counterclaimed alleging that Hill's report of the incident to Stone and Pamplin was slanderous.

Hilliard Lyons turned the investigation of Hill's report over to its law firm in October, 1993. The firm, which is now defending Hilliard Lyons against Hill's claims, took more than three months to investigate the report and concluded it could not determine whether Hill consented to Brab's assault. During the period of the investigation, Brab effectively determined Hill's compensation, personally distributed her bonus check, and continued to occupy the office next to her. Although Hill was told she was reporting to Pamplin, he never responded to her requests for job responsibilities or direction and he told her merely to "do whatever it is you do." In early February, 1994 Pamplin required Hill to stand next to Brab in front of the audience at the annual sales meeting and, when she objected, told her if she did not like it she "could just stay home." In March, 1994 Stone came into Hill's office and informed her that the company could put her "in data processing, or the mail room, or out in the branches, we will do whatever we want to." (Complaint, Jefferson Circuit Court, paragraphs 30-49)[2]

The Respondents moved to dismiss Hill's lawsuit and defer the case to arbitration on the basis of *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). *Gilmer* held that the National Association of Securities Dealers' ("NASD") U-4 form required for persons applying to work in the Securities Industry is a contract under the Federal Arbitration Act, 9 U.S.C. §1, *et seq* ("FAA"). Accordingly, form U-4 and New York Stock Exchange Rule 347 require employees to "arbitrate any dispute", including a statutory civil rights claim, "arising out of the [the employee's] employment or termination of employment." 500 U.S. at 22-24. It is undisputed that Hill signed the U-4 form

---

[2]Appendix "A" to Appellant's brief, Kentucky Court of Appeals.

when applying for work at Hilliard Lyons as a broker in 1991.

After briefing and oral argument, the Circuit Court issued an order on February 8, 1995 finding that all Hill's claims arose out of her employment and required the case to be arbitrated. (App. 11a-12a) Upon Hill's motion, to clarify the final and appealable nature of its earlier order, the Circuit Court on March 6, 1995, signed an amended order dismissing the action. (App. 13a) Hill filed a timely notice of appeal.

After briefing and argument, the Court of Appeals issued an order on June 21, 1996 remanding for trial Hill's claims of assault and battery and false imprisonment against Brab, but affirming the arbitration order on her claims of intentional infliction of emotional distress, sexual harassment, retaliation and equal pay violations against all defendants. According to the Court of Appeals, the predicate claims against Brab involving the rape were "independent of the employment relationship" and therefore not arbitrable. However, the remaining claims involving retaliation were arbitrable because they "relate to the alleged action or inaction Hilliard Lyons took as Hill's employer in response to her report of the incident in New York." (App. 8a-9a)

Brab then filed a petition for rehearing or alternatively a request to modify the opinion to clarify his right to pursue in court his counterclaim against Hill alleging slander when she reported the rape to Hilliard Lyons management. On September 20, 1996 the Court of Appeals denied the petition for rehearing but granted the request for modification and made clear Brab's right to pursue on remand his counterclaim against Hill "to the extent [it] relates to the charges by Hill now to be heard in the Jefferson Circuit Court." (App. 9a)

On June 11, 1997 the Supreme Court of Kentucky denied petitions for discretionary review by both Hill and Brab. (App. 1a)

At present, although demoted from her management position, Hill continues to work for Hilliard Lyons as a broker in a branch office.

REASONS FOR GRANTING THE PETITION

A. This Case Presents An Important And Unsettled Question Of Federal Law Requiring Prompt Resolution

1. The legal status of employer mandated arbitration of employment disputes is and will remain unsettled.

Following *Gilmer,* the Courts have with virtual unanimity enforced mandatory arbitration[3] of employment disputes in a variety of situations.[4] There is a strong consensus in favor of Alternative Dispute Resolution in general and arbitration of employment disputes in particular. Yet, there is a vigorous, and growing rejection of *mandatory* arbitration by those institutions vital to the successful private resolution of these disputes. Except for management lawyers writing articles seeking to advise potential clients on how to implement enforceable policies, mandatory arbitra-

---

[3]The practice here discussed is most accurately called a mandatory pre-dispute arbitration agreement and waiver of judicial forum. For convenience this practice will be referred to as "mandatory arbitration".

[4]Among the most recent Courts of Appeals decisions to enforce mandatory arbitration agreements are *Cole* v. *Burns Int'l Security Svcs,* 105 F.3d 1465 (D.C. Cir. 1997) and *Great Western Mortgage* v. *Peacock,* 110 F.3d 222 (3d Cir. 1997). It should also be noted that the appellate courts are unanimous that the FAA Section 1 exemption for "contracts of employment" is to be applied narrowly, only to workers actually engaged in interstate commerce. *Great Western, supra,* 110 F.3d at 227.

tion has been strongly criticized by most analysts, the EEOC and recently rejected by even the NASD.

The following recent developments are significant:

On August 7, 1997 the NASD voted to amend its U-4 form to allow securities industry employees either to choose arbitration or reserve the right to file statutory discrimination claims in court.[5] The text of the proposed rule is still being drafted, but will be effective one year after it is approved by the Securities and Exchange Commission.[6] The SEC commissioners have stated they welcome the change.[7] This action raises substantial questions about the premise in *Gilmer* that mandatory arbitration can fairly resolve employment claims, when the very institution approved by this Court as properly requiring the process subsequently declines the designation.

On July 10, 1997 the Equal Employment Opportunity Commission reaffirmed its view in a detailed policy statement that mandatory arbitration as a condition of employment is "contrary to fundamental principles" of the federal civil rights laws.[8] The basis of the EEOC's criticism was essentially that mandatory arbitration (1) would inhibit the development of civil rights laws through public decision making and (2) contains inherent biases against claimants.[9] Accordingly, although the EEOC strongly supports

---

[5]9 Empl. Discrimination Rep. (BNA) No. 7 at 214 (August 13, 1997).

[6]9 Empl. Discrimination Rep. (BNA) No. 9 at 323-4 (August 27, 1997).

[7]*Id.*

[8]EEOC Policy Statement on Mandatory Arbitration, 9 Empl. Discrimination Rep. (BNA) No. 3 at 87-92 (July 16, 1997).

[9]*Id.*

voluntary arbitration, it intends to continue to challenge mandatory arbitration as unlawful.[10]

On May 21, 1997 the National Academy of Arbitrators adopted a statement opposing mandatory arbitration as a condition of employment for resolving statutory claims.[11]

In January, 1995 the "Dunlop Commission" issued a report strongly endorsing voluntary arbitration to settle employment disputes after they arose, but rejecting mandatory arbitration.[12]

Numerous arbitrators have written articles critical of mandatory arbitration as being fundamentally unfair and inimical to the voluntariness which is crucial to the viability of the process.[13]

---

[10]*Id.*

[11]8 Empl. Discrimination Rep. (BNA) No. 23 at 758 (June 4, 1997).

[12]U.S. Dep'ts of Labor and Commerce, Commission on the Future of Worker- Management Relations, Report and Recommendations (December 1994) at 33.

[13]*See e.g.*, Rabin, *The Role of Government in Regulating the Workplace*, 13 Lab. Law. 1, 17 (Summer 1997) ("It is hard to think honestly and clearly about private systems of dispute resolution when the Court tells us blithely that Mr. Gilmer made a free choice to submit all his disputes to arbitration."); Siegel, *Changing Public Policy: Private Arbitration to Resolve Statutory Employment Disputes*, 13 Lab. Law. 87, 98 (Summer 1997); Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 Hofstra Lab. L.J. 1, 52 (Fall 1996); Gershenfeld, *Pre-Employment Dispute Arbitration Agreements: Yes, No and Maybe*, 14 Hofstra Lab. L.J. 245, 262 (Fall 1996); Gorman, *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U.Ill. L. Rev. 635; Cooper *Where Are We Going With Gilmer? - Some Ruminations on the Arbitration of Discrimination Claims*, 11 St. Louis U. Pub. L. Rev. 203 (1992).

Thus, mandatory arbitration has been rejected by both the federal agency responsible for the enforcement of the civil rights laws and those most knowledgeable about the arbitration process—the neutral professional arbitrators themselves.

Simultaneously, however, there has developed a consensus among these same institutions about most of the basic procedures necessary to ensure a fair hearing in employment disputes. In 1995 a Protocol[14] was drafted by lawyers from both sides of the debate and endorsed by all the private organizations listed above as well as the Society of Professionals in Dispute Resolution, the officers of the Labor Law Section of the American Bar Association, the American Civil Liberties Union and the Federal Mediation and Conciliation Service.[15] The Protocol reflects standards regarding the employee's right to representation, discovery, arbitrator qualifications and remedies. However, the drafters of the Protocol were unable to agree on whether to endorse or condemn mandatory arbitration and took "no position on the timing of agreements to mediate/arbitrate statutory employment disputes, though it agrees such agreements [should] be knowingly made."[16]

In May, 1997 the American Arbitration Association amended its Rules of Procedure which, although continuing to accept cases arising under mandatory systems, now require such programs to be consistent with the AAA's own Rules and the Protocol.[17]

---

[14]A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, Disp. Res. J. Oct-Dec. 1995 at 37. (hereinafter the "Protocol").

[15]*Id.*

[16]*Id.* at §A (Pre-or Post-Dispute Arbitration).

[17]8 Empl. Discrimination Rep. (BNA) No. 23 at 778-80 (June 4, 1997).

It should be emphasized that the Protocol and other private procedural codes do not have any legal force and cannot be imposed on any employer. Indeed, in *Gilmer*, the employee's procedural rights were substantially less than under these procedures.

In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 34, 51 (1974), this Court found it "clear that there can be no prospective waiver of an employee's [Title VII] rights." While *Gilmer* rejects *Alexander's* holding that these rights include the right to a judicial forum, it did not otherwise question this premise. *Gilmer* did not address in any analytical way the issue of a knowing and voluntary pre-dispute waiver.

As a matter of both general law and civil rights law, waivers must be knowing and voluntary. *Prudential Insurance Co.* v. *Lai*, 42 F.3d 1299 (12th Cir., 1994), cert. denied 116 S.Ct. 61 (1995) However, no appellate court has yet fully explored the issue as it relates to mandatory arbitration agreements.

The core of the argument against mandatory arbitration is that it cannot, as a matter of fundamental fairness, reflect a knowing and voluntary relinquishing of an employee's right to go to court. As counsel for the EEOC has stated, waiver of a judicial forum simply cannot be truly knowing before a dispute has arisen or truly voluntary if obtained as a condition of employment.[18] The usual response to this argument is that the agreement under consideration meets the *Gilmer* test that there was no fraud or coercion and sometimes recites Plaintiff's business sophistication and education.[19] Yet, it seems clear that waiver

---

[18]8 Empl. Discrimination Rep. (BNA) No. 12 at 372 (March 19, 1997).

[19]*See.* e.g. *Great Western Mortgage* v. *Peacock*, 110 F.3d 222 at 229 (3d Cir. 1997).

of the right to a judicial forum should be based on something more than the absence of fraud. The real issue is whether it is necessary for an employee to truly support the arbitration process or whether it is legally sufficient for her merely to know she must arbitrate any claims under procedures dictated by her employer if she wants to be hired or continue working.

Given the forceful and entrenched opposing views on mandatory arbitration, it is respectfully submitted there will be no workable system of private arbitration of employment disputes any time soon. It is virtually certain that court challenges to mandatory arbitration and its attendant procedural infirmities will continue. Therefore, this Court should promptly address the question of whether mandatory arbitration agreements are permissible as a condition of employment under the FAA.

2. Truly voluntary arbitration of employment disputes is being hindered.

As observed earlier, there is consensus both on the desirability of voluntary arbitration of employment disputes and the essentials of the due process rights necessary in such a system.[20] Accordingly, it is proper to ask if mandatory arbitration is necessary to achieve the goal of fair and effective private resolution of employment disputes. Analysis reveals that voluntary, post-dispute arbitration is a workable, self regulating mechanism with all the benefits of mandatory arbitration and none of its drawbacks.

The advantages of mandatory arbitration are generally said to be that it is a faster, cheaper alternative to litigation. Yet, voluntary, post-dispute arbitration has both these advantages, and is probably faster and cheaper since there

---

[20]*See*. p. 8, *supra*.

is no need to litigate over arbitrability or other such questions. The real difference between mandatory and voluntary arbitration is the procedural advantage, real or perceived, the employer enjoys in a mandatory system. Both the EEOC and pro-management writers indicate that mandatory arbitration results in outcomes more favorable to management than court actions.[21]

The preservation of a procedural advantage to the party imposing arbitration is a poor reason to insist on adherence to the practice. However, no other reason is readily apparent for insisting on mandatory arbitration as opposed to voluntary, post-dispute arbitration. For example, the only difference between pre- and post-dispute *mandatory* arbitration is the timing of the imposed arbitration procedure. There is no difference in the employer's ability to select the procedural details. Yet, no one even suggests it would be acceptable for an employer to require an employee to adhere to a mandatory arbitration procedure *after* the dispute arises. But the problem with post-dispute mandatory arbitration is precisely the same as pre-dispute: the employee is required to accept the practice as imposed in order to keep her job. So long as the employee's only choice is either to accept the procedure, or forfeit her

---

[21]See, EEOC Policy Statement, *supra* n. 8 at 90-2. *See also* Bompey, *The Attack on Arbitration and Mediation of Employment Disputes*, 13 Lab. Law. 21, 65 (Summer 1997) in which a survey of 337 awards representing all available NASD and NYSE awards involving discrimination claims since 1991 was conducted by a law firm representing management. Employees prevailed on at least one of their claims in only 42% of the cases and the awards "tend to be low—often less than six figures." *Id.* at 66. The survey concluded that "employers stand a greater chance of success in arbitration than in court before a jury." *Id.* Perhaps potential claimants recognize this fact, which would account for the suprisingly small number of arbitration awards in the securities industry since *Gilmer*, and suggests a rejection of the mandatory arbitration process by employees.

job, there will continue to be litigation over mandatory arbitration.

It is to be expected that any party to a dispute will seek a procedural advantage if one is available. When the system provides for effective procedural control by one party to be imposed on a "take it or leave it" basis on the other, the only results can be either continuing procedural disputes or a rejection of the process.

Voluntary post-dispute arbitration, in contrast, has none of these disadvantages. By definition, the employee opts to arbitrate her dispute after the claim has ripened with full knowledge of her legal options, and most likely after consulting counsel. Litigation over arbitrability and other procedural details would be virtually nonexistent since they would be specifically agreed upon prior to submission to arbitration.

This Court has, over the past thirty-five years, struggled with limited success to define the test by which courts determine arbitrability, i.e. whether the parties agreed to arbitrate the merits of a dispute. Two recent cases indicate this Court is still struggling. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) An arbitration procedure which insulates courts from arbitrability determinations is a significant benefit.

If arbitration of employment disputes will be as beneficial as everyone says, there should be nothing wrong with requiring that both sides agree to it after the dispute has arisen. To permit an employer to impose manadatory arbitration for a perceived procedural advantage is counterproductive and inhibits development of the process.

B. Mandatory Arbitration Is Clearly Unworkable In This Case

The practical problem with a mandatory arbitration as currently imposed is illustrated in a concrete way by the

nightmare Hill faces in this case. Because she signed the required U-4 form in order to be employed in 1991, she supposedly agreed to arbitrate her 1994 claim of top management's conspiracy to stonewall her report of their colleague Brab's sexual assault.

This dispute will be decided by white males, involved with the securities industry, over age sixty, with little or no experience in employment law.[22] There will be limited discovery, the decision will not be published and can be set aside only on a showing of "corruption, fraud or misconduct."[23]

Hill's allegations involve serious wrongdoing by the top executives of a prominent Regional brokerage firm who are known, at least casually, by the arbitrators who will hear her case. The safeguards of the ABA Protocol have not been adopted and there is no incentive to do so.

However, after three years of litigation, she may now pursue her independent tort action for rape against Brab in court, thus further complicating her options and draining her resources.

Contrast this existing situation to a voluntary, post-dispute arbitration procedure. Hill would have the choice either to invoke arbitration or take her claims to court. Presumably, the due process protocol would be in effect, or if not, Hill would have some leverage to insist upon any procedural safeguards she deems necessary. If voluntary arbitration is agreed upon, then the advantages of speed

---

[22]U.S. Government Accounting Office, Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes, GAO/HEHS-94-17, 12 (Mar. 1994) Neither the NASD or New York Stock Exchange has implemented any procedural safeguards to address the concerns raised in this report. Bompey, *supra* n. 21 at 67.

[23]9 U.S.C. §10 (1994).

and efficiency follow automatically and there is no concern about litigation over arbitrability. If the parties do not agree to arbitration, although there are powerful reasons to do so, Hill's court action would likely be over by now. In addition, the Respondents would have greater reason to settle the dispute if faced with the prospect of a judicial forum instead of private arbitration where they have a procedural advantage.

Clearly, voluntary, post-dispute arbitration is the only workable system in this case.

C. Hill's Claims Of Workplace Retaliation Are Not Arbitrable Because They Arise Out Of A Sexual Assault Unrelated To Her Employment

The Kentucky Court of Appeals permitted Hill's claims of sexual assault and false imprisonment against Brab to proceed in a judicial forum because they were "independent of the employment relationship." Clearly, being raped by one's boss does not "arise out of" one's employment and the determination of such a claim by a panel of securities industry arbitrators is ridiculous on its face.

A more difficult issue involves the treatment of the claims arising after Hill reported her assault. Hill alleges essentially that Brab and his fellow members of the Board of Directors conspired to demote and embarrass her in her job because she reported the incident. Brab counterclaimed alleging that Hill's report was slanderous. The Court of Appeals held Hill's retaliation claims against the company, Brab and his colleagues were arbitrable because they "relate to the action or inaction Hilliard Lyons took as an employer in response to her report."

This treatment by the Court of Appeals is erroneous because it ignores the relevant contract language with respect to arbitration and court decisions interpreting that language. The retaliation claims "arose out of" Brab's alleged assault which was held to be nonarbitrable.

This Court's core teaching, not recognized by the Court of Appeals, is that judicial arbitrability determinations must be firmly grounded in the specific terms of the contract requiring arbitration. Thus, because arbitration is a matter of contract, "a party cannot be required to submit to arbitration any dispute which he has not so agreed to submit." *AT&T Technologies, Inc.* v. *Communications Workers of Amer.*, 475 U.S. 643, 648 (1986). The FAA makes arbitration agreements "as enforceable as other contracts, but not more so." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)

The principle of the primacy of the contract's terms is unquestionably the continuing cornerstone in FAA cases. In *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) this Court considered whether arbitrators in securities industry cases were permitted to award punitive damages. This Court's discussion began by observing that, notwithstanding the federal policy favoring arbitration, "courts are bound to interpret contracts in accordance with the expressed intention of the parties—even if the effect of those intentions is to limit arbitration." 514 U.S. at 58. Thus, the determination "comes down to what the contract has to say about the arbitrability" of the claim. *Id.*

The flaw in the Court of Appeals' analysis in this case is its failure to give effect to the relevant contract language. It attempts to distinguish the federal appellate cases interpreting that language and adopting the "job performance" test on the ground those cases dealt with post termination claims while Hill's claims arose during her employment. Yet, the relevant contract language is not confined to post termination claims, and restricts arbitration to disputes "arising out of employment or termination of employment." There is simply no contractual or legal reason to limit the "job performance" test to post termina-

tion disputes. The fact that most disputes involve termination of employment is irrelevant to the consideration of whether a dispute arises out of employment. No principled basis exists to use a different test in pre and post termination claims.

The infirmity of the Court of Appeals' analysis is most clearly seen in its treatment of Respondent Brab's request to modify its opinion. At the hearing before the Circuit Court, Brab agreed to arbitrate his counterclaim against Hill alleging slander when she reported the rape to top Hilliard Lyons management. After the Court of Appeals' opinion permitting Hill to pursue her rape claims against him, Brab requested that the court make clear his right to pursue the counterclaim against Hill in Circuit Court. The Court of Appeals granted the request and modified its opinion allowing him to pursue his counterclaim as part of the action on remand.

The anomalous effect of the modified order is to allow Brab to sue Hill in court for slander because she reported his conduct to Hilliard Lyons, yet Hill must arbitrate the company's actions retaliating against her for making that very report. Does Hill's allegedly slanderous report to Hilliard Lyons of Brab's action arise out of employment any less than the company's retaliation against her for making the report? Surely not.

It is respectfully submitted that these analytical problems are eliminated by a careful consideration of the contract language as required by this Court. Under the FAA, the term "arising out of" is more restrictive for the purpose of compelling arbitration than the term "relating to". *Tracer Research Corp.* v. *National Environmental Services Company*, 42 F.3d 1292, 1295 (9th Cir. 1994); *Mediterranean Enterprises, Inc.* v. *Ssangyong Corp.*, 708 F.2d 1458 (9th Cir. 1983) The Court of Appeals' analysis, that Hill's sexual harassment claims arise out of her employment because

they "relate to" the Company's actions taken in response to her report, is therefore wrong as a matter of law. Unlawful conduct plainly can "relate to" a person's employment, but not constitute a dispute "arising out of" that employment.

The language of the contract requires inquiry into the cause of the dispute. Clearly, the cause of this dispute was the alleged rape which the Court of Appeals has held to be nonarbitrable. It necessarily follows, then, that the rape is the cause of the alleged retaliation. Hill's job performance has, in any event, never been claimed to be a factor in the retaliatory conduct against her. If the retaliation claims do not arise out of the rape, what do they arise out of?

It may well be that the *effect* of Hill's report of Brab's rape was workplace retaliation. But this is not the issue. The requisite inquiry for the purpose of judicial determination of arbitrability is the *cause* of the dispute. There can be no doubt that the real cause of this dispute is Brab's alleged rape.

Before *Gilmer*, the standard developed by the federal appellate courts for determining whether a dispute arises out of employment in the securities industry was whether the claim's resolution "depends upon evaluation of a party's performance either as a broker or as an employer of brokers during the time of the contractual relationship." See, *Fleck* v. *E.F. Hutton Group, Inc.*, 891 F.2d 1047, 1053 (2nd Cir. 1989). Nothing in *Gilmer* suggests this test was being modified or overruled. This Court merely held that the statutory nature of a claim did not prevent its being arbitrated pursuant to a contract under the FAA.

The Court of Appeals decision, holding claims arbitrable because they "relate to" employer actions taken *qua* employer, effectively interprets the agreement as requiring arbitration of any dispute with the employer. But the contract does not say "any dispute with an employer" or

"any dispute relating to employment". The contract says "any dispute arising out of employment". This latter term has been authoritatively interpreted to limit arbitration to those claims whose resolution turns on the claimant's job performance. Its meaning was not discussed or altered in *Gilmer*. The "job performance" test, although broad enough to require arbitration in most employment cases, is not so broad as to encompass claims arising out of a supervisor's rape of a subordinate.

CONCLUSION

The enforcement of mandatory arbitration agreements is unnecessary and counterproductive to establishing a workable system of nonjudicial employment dispute resolution. Employees will not, as a practical matter, accept a system imposed by their employer before a dispute has arisen and in which they have no procedural input.

Voluntary arbitration, entered into after a dispute has arisen, is a viable method of dispute resolution which is being hampered by the current debate. This Court should reject mandatory waiver of a judicial forum in employment disputes as contrary to the Civil Rights laws and the Federal Arbitration Act. At the very least, this Court should require lower courts to follow the terms of the contract regarding arbitrability.

Respectfully submitted,

GARY L. THEURER, ESQ.
15005 Spring Meadow Drive
Germantown, Maryland 20767
(301) 977-5779
Counsel of Record

IVAN H. RICH, JR., ESQ.
RICH & D'AMBROSIO, P.S.C.
3044 Breckenridge Lane, Suite 103
Louisville, Kentucky 40220
(502) 493-0503
Counsel for Petitioner, Jane D. Hill

September 9, 1997

APPENDIX

SUPREME COURT OF KENTUCKY

96-SC-922-D
(95-CA-898)

JANE D. HILL - - - - - - - - - - - *Movant*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.,
JAMES C. STONE, III,
GILBERT L. PAMPLIN, and
WOLFGANG WILLIAM BRAB - - - - - - *Respondents*

AND

96-SC-923-D
(95-CA-898)

WOLFGANG WILLIAM BRAB - - - - - - - *Movant*

v.

JANE D. HILL - - - - - - - - - - - *Respondent*

Jefferson Circuit Court
No. 94-CI-5086

ORDER DENYING DISCRETIONARY REVIEW

The motions for review of the decision of the Court of Appeals are denied.

ENTERED: June 11, 1997.

/s/ Robert F. Stephens
Chief Justice

COURT OF APPEALS OF KENTUCKY

95-CA-0898-MR

JANE D. HILL - - - - - - - - - - *Appellant*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN - - - - - - - - - *Appellees*

Appeal From Jefferson Circuit Court
Honorable William Knopf, Judge
Civil Action No. 94-CI-5086

ORDER GRANTING PETITION TO MODIFY OPINION/DENYING REQUEST FOR REHEARING

BEFORE: WILHOIT, Chief Judge; COMBS, and HOWERTON, Judges.

Appellee, Wolfgang William Brab, has petitioned for rehearing and/or modification or extension of this Court's opinion in the captioned case rendered June 21, 1996, to which no response was filed. Agreeing with Brab's request to modify the opinion, it is hereby GRANTED, and the attached pages 1 and 9 are ORDERED substituted for pages 1 and 9 and page 10 added to our original opinion.

The request for rehearing is hereby DENIED.

ENTERED: September 20, 1996

/s/ Anthony M. Wilhoit
Judge, Court of Appeals

RENDERED: JUNE 21, 1996; 2:00 P.M.
TO BE PUBLISHED
MODIFIED: SEPTEMBER 20, 1996; 10:00 A.M.

COURT OF APPEALS OF KENTUCKY

95-CA-0898-MR

JANE D. HILL - - - - - - - - - - *Appellant*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN - - - - - - - - *Appellees*

Appeal From Jefferson Circuit Court
Honorable William Knopf, Judge
Civil Action No. 94-CI-5086

OPINION—AFFIRMING IN PART; VACATING AND REMANDING IN PART

BEFORE: WILHOIT, Chief Judge; COMBS, and HOWERTON, Judges.

HOWERTON, JUDGE. Jane Hill appeals from an order of the Jefferson Circuit Court dismissing her claims of sexual assault and battery, false imprisonment, intentional infliction of emotional distress, along with sexual harassment, retaliation, and violation of the equal pay law under KRS Chapter 344. The circuit court determined that the claims arose out of Hill's employment and were therefore subject to mandatory arbitration. We vacate the order as to the dismissal of the allegations of sexual assault and battery and false imprisonment against Wolfgang William Brab, and we remand for further proceedings. As to the dismissal of the other charges and parties, we find no error and affirm.

Hill was employed by Hilliard Lyons as a stockbroker in February 1991, and was elected to the position of Vice-President of Branch Administration and Marketing in September of 1993. As a condition of her employment, Hill was required to register as a securities representative with self-regulatory organizations, including two stock exchanges, by completing and signing Form U-4, "Uniform Application for Securities Industry Registration or Transfer." By signing the form, Hill agreed to submit any dispute, claim, or controversy between Hilliard Lyons and herself to arbitration. Specifically, Hill agreed to the following provision:

> 5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm or a customer or any other person, that is required to be arbitrated under rules, constitutions or bylaws of the organizations listed in item 10 as may be amended from time to time and that any arbitration award entered against me may be entered as a judgment in a court of competent jurisdiction.

The "organizations listed in Item 10" are the American Stock Exchange, the National Association of Securities Dealers, and the New York Stock Exchange, all of which Hilliard Lyons is a member. Rule 347 of the New York Stock Exchange Rules provides:

> Any controversy between a registered representative and any member or member organization arising out of employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any party, in accordance with our arbitration procedure prescribed elsewhere in these rules.

The National Association of Securities Dealers has a similar rule.

Hill alleged that in October 1993, she was raped by her supervisor, W. William Brab, while they were attending a convention in New York. She further alleged that Brab threatened her that if she told anyone of the incident, she

would lose her job. Hill eventually reported the alleged incident to a Hilliard Lyons Executive Vice-President, James C. Stone, and the Board Chairman, Gilbert L. Pamplin, and was given assurances that her complaint would properly be resolved. However, following the meeting, Hill alleged that she had to continue working in the office next to Brab, that she was required to appear at an awards presentation with Brab, and that she was given a bonus which was substantially less than she had been promised upon accepting the position. Hill maintained that Brab continued to exercise retaliatory authority over her and that her job responsibilities were reduced.

Hill initially filed a charge with the Equal Employment Opportunity Commission (EEOC) in Louisville, alleging sexual harassment and retaliation against Hilliard Lyons and Brab. As a result, Hill stated that her job responsibilities were further reduced and many of her responsibilities were reassigned to a male counterpart. Subsequently, in September 1994, Hill filed an action in the Jefferson Circuit Court against Hilliard Lyons, Brab, Stone, and Pamplin, claiming assault and battery, false imprisonment, intentional infliction of emotional distress, along with sexual harassment, retaliation, and violation of the equal pay law under KRS Chapter 344. The appellees collectively moved to dismiss and defer the case to arbitration on the basis of *Gilmer* v. *Interstate/Johnson Lane Cory.*, 500 U.S. 20, Ill S.Ct. 1647, 114 L.Ed.2d 26 (1991).

Following oral argument, the circuit court entered an order finding that Hill's claims arose out of her employment at Hilliard Lyons and were therefore subject to the mandatory arbitration agreement signed by Hill. On February 8, 1995, the court stayed the action pending completion of the arbitration proceedings. However, on March 6, the court entered an order dismissing all of Hill's claims. This appeal ensued.

Hill argues that the court erred in ruling that her claims were subject to mandatory arbitration under *Gilmer*, because they did not arise out of her employment and are

therefore outside the scope of the arbitration agreement. At the outset, we recognize that Hill has the burden of showing that her claims are not subject to arbitration.

> Congress has delegated broad powers to self regulatory organizations within the securities industry to police the conduct of their members. This broad legislative delegation of power strengthens the presumption that disputes among members of such organizations and individuals associated therewith are arbitrable.

Spellman v. *Securities, Annuities & Ins. Services, Inc.*, 8 Cal. App.4th 452, 464, 10 Cal. Rptr.2d 427, 435, *modified* 8 Cal. App. 4th 1198 (1992) (citing to *Francis* v. *Marshall*, 661 F.Supp. 773 (D. Mass. 1987)).

Further, whenever an arbitration agreement exists, the Federal Arbitration Act establishes that, as a matter of law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983); See *also Asplundh Tree Co.* v. *Bates.*, 71 F.3d 592 (1995).

The United States Supreme Court in *Gilmer* v. *Interstate/Johnson Lane Corp., supra*, held that agreements in the securities industry by brokers to arbitrate claims arising out of employment are governed exclusively by the Federal Arbitration Act (FAA). Gilmer was a registered security representative with the New York Stock Exchange, who also had signed a Form U-4 as a condition of employment. When he was terminated at age 62, Gilmer filed suit alleging age discrimination in violation of the Age Discrimination in Employment Act. The Supreme Court determined that Gilmer's claim was subject to mandatory arbitration pursuant to the FAA.

The *Gilmer* holding and analysis has been consistently applied to actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, as well as discrimination cases under state law. The Sixth Circuit in *Willis* v. *Dean Witter Reynolds. Inc.*, 948 F.2d 305 (6th Cir. 1991), ordered arbi-

tration of sexual harassment and sexual discrimination claims under Chapter 344 of the Kentucky Revised Statutes and Title VI, along with Willis, common law tort claims of outrage and breach of contract. Willis indicated that the "outrage" occurred in the workplace. Likewise, in *Bender* v. *A.G. Edward & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992), the Eleventh Circuit relied on the rationale in *Gilmer* in holding that a stockbroker was required to arbitrate her sexual harassment claims under Title VII pursuant to her registration application with the National Association of Securities Dealers and the New York Stock Exchange. The court also ordered arbitration of Bender's state law claims for battery, intentional infliction of emotional distress, and negligent retention. The Bender opinion did not reveal where the battery occurred or the nature of the offense.

Hill argues that *Gilmer* did not affect the prior line of cases interpreting the "arising out of . . . employment" language of Rule 347. In support, Hill relies on *Morgan* v. *Smith Barney, Harris Upham & Co.*, 729 F.2d 1163 (8th Cir. 1984), in which the Eighth Circuit determined that a claim must involve some connection with "customers or securities agencies" or a "significant issue of . . . [plaintiff's] job performance" to require mandatory arbitration. Id. at 1167. *See also Pearce* v. *E.F. Hutton Group, Inc.*, 828 F.2d 826 (D.C. Cir. 1987); *Fleck* v. *E.F. Hutton Group, Inc.*, 891 F.2d 1047 (2nd Cir. 1989); *Aspero* v. *Shearson Am. Express*, Inc., 768 F.2d 106 (6th Cir. 1985).

A thorough reading of the above decisions convinces us that Hill's reliance is somewhat misplaced. *Morgan* and subsequent decisions all espouse the standard by which to determine whether post-employment claims are subject to arbitration. In recognizing the difficulty in determining which post-employment claims should be subject to mandatory arbitration, the 2nd Circuit in *Fleck* relied on the *Morgan* test that there must involve "significant aspects of the employment relationship." These decisions are, to some extent, distinguishable from Hill's claims which arose during her employment with Hilliard Lyons.

We have no difficulty in concluding that all of Hill's claims against Hilliard Lyons, Stone, and Pamplin arose out of her employment. Hill's allegations of sexual harassment, retaliation, and violation of the equal pay law all relate to the alleged action or inaction Hilliard Lyons took as Hill's employer in response to her report of the incident in New York. These charges against Brab are likewise subject to arbitration. However, we cannot agree that Hill's other allegations against Brab arose out of her employment. The only connection those torts or crimes have with Hill's employment is that they were committed by a co-worker and occurred while on a business trip.

The circuit court stated, and we agree, that rape does not ordinarily arise out of the employment context. Nevertheless, the trial court dismissed all claims for two reasons. Although Hill's tort claims of assault and battery and false imprisonment arise most immediately from Brab's conduct, the ensuing chain of events and the course of action Hill chose to pursue were made in direct connection with her employment. Hill elected not to pursue criminal charges against Brab or to sue him personally and exclusively. Instead, she originally sought recourse through the EEOC. It is cogent that the EEOC's sole domain is employment-related matters, yet Hill now contends that her claims do not arise out of her employment. The circuit court was also persuaded that Hill's allegations against Brab were so interwoven with those against the other appellees that all claims could be found to have arisen from her employment. The video record indicates that Judge Knopf struggled with this problem, but finally concluded that the case should not be prosecuted piecemeal. All claims were to be subjected to arbitration.

We, too, have struggled with the same problems and reasoning, but we nevertheless conclude that, in this situation, the alleged offenses by Brab of rape, assault and battery, and false imprisonment were erroneously dismissed. They simply cannot be considered as non-actionable in court as anything "arising out of the employment."

The mere fact that these tort claims might not have arisen but for the fact that the two individuals were together as a result of an employer-sponsored trip cannot be determinative. What Brab is accused of doing is independent of the employment relationship. We will not expand the arbitration agreement merely for the sake of efficiency. In this case, it is the Federal Arbitration Act and the contract that can be said to require a "piecemeal" resolution. *See Moses* v. *Cone Memorial Hosp.* v. *Mercury Constr. Corp., supra.*

In affirming part of the decision that Hill's claims must be subject to arbitration, we have not denied her access to a court. She can pursue her claims which are subject to arbitration, and if the result is somehow legally deficient, she may return to court for review. *Mitsubishi Motors Corp.* v. *Sale Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

We note that the order of the Jefferson Circuit Court, from which this appeal was taken, provided in part, "[b]y agreement of the Defendant, Wolfgang William Brab, his counterclaim shall be disposed of in a forum similar to that handling the Plaintiff's claims." Brab had filed a counterclaim against Hill for slander. To the extent that his counterclaim relates to the charges brought by Hill now to be heard in the Jefferson Circuit Court, it shall remain a part of the action on remand.

Accordingly, the order of the Jefferson Circuit Court dismissing Hill's action is vacated to the extent that it dismissed her personal tort claims of rape, assault and battery, and false imprisonment against Brab and remanded for further proceedings against him. As to the dismissal of the other charges and parties, the decision is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:
Ivan H. Rich, Jr.
Louisville, KY

BRIEF FOR HILLIARD LYONS:
Walter L. Sales
Thomas M. Williams
Louisville, KY

ORAL ARGUMENT FOR
HILLIARD LYONS:
Walter Sales
Louisville, KY

BRIEF AND ORAL ARGUMENT
FOR W. WILLIAM BRAB:
Eleanore M. Garber
Louisville, KY

RENDERED: JUNE 21, 1996; 2:00 P.M.

JEFFERSON CIRCUIT COURT

DIVISION NINE (9)

95-CA-0898-MR

JANE D. HILL - - - - - - - - - - - *Plaintiff*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN - - - - - - - *Defendants*

ORDER—Entered February 8, 1995

This action is before the Court for a ruling on the motions of the Defendants to dismiss or in the alternative to stay proceedings. On the 6th day of February, 1995, oral arguments were heard by the Court and recorded on video tape 30-9-95 VCR 009 (10:14 10:55) . At the oral arguments, Ivan H. Rich, Jr. , appeared for the Plaintiff, Jane D. Hill, Scott T. Wendelsdorf, appeared for the Defendants, J.J.B. Hilliard, W. L. Lyons, Inc., James C. Stone, III, and Gilbert L. Pamplin, and Eleanore M. Garber, appeared for the Defendant, Wolfgang William Brab.

The Court having reviewed and considered the memorandums of law filed in the record, heard oral arguments, and being otherwise sufficiently advised, finds that the claims made in this lawsuit by the Plaintiff, Jane D. Hill, are subject to the mandatory arbitration agreement signed and agreed to by the Plaintiff known as Form U-4, "Uniform Application for Securities Industry Registration or Transfer". Under the specific facts of this case and applicable law, this Court finds that all of the Plaintiff's claims arise out of her employment at J.J.B. Hilliard, W.L. Lyons, Inc. and thus must be submitted for mandatory arbitration. *Gilmer* v. *Interstate/Johnson Lane Corporation,* 500

U.S. 20, 114 L.Ed 2d 26, 111 S.Ct. 1647 (1991). By agreement of the Defendant, Wolfgang William Brab, his counterclaim shall be disposed of in a forum similar to that handling the Plaintiff's claims.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that all claims in this action are hereby STAYED pending the completion of mandatory arbitration between all parties to this action.

This is a final and appealable Order, there being no just reason for delay.

Entered: February 8, 1995

/s/ William L. Knopf
William L. Knopf, Judge

c: Ivan H. Rich, Jr.
Scott T. Wendelsdorf
Eleanor M. Garber

JEFFERSON CIRCUIT COURT

DIVISION NINE (9)

94-CI-05086

JANE D. HILL - - - - - - - - - - - *Plaintiff*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN - - - - - - - *Defendants*

ORDER—Entered March 6, 1995

This Court, being fully advised in the premises, hereby amends its Order of February 8, 1995, staying this action. Defendants' Motions are granted. This is a final and appealable order and there is no just cause for delay.

/s/ Illegible
Judge, Jefferson Circuit Court

Date: March 6, 1995

(2)

Supreme Court, U.S.
FILED
OCT 14 1997
CLERK

No. 97-450

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANE D. HILL, - - - - - - - - - *Petitioner,*

versus

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN, - - - *Respondents.*

On Petition for Writ of Certiorari
To the Kentucky Court of Appeals

BRIEF IN OPPOSITION OF RESPONDENTS EXCEPT BRAB

JOHN T. BALLANTINE, JR.*
WALTER LAPP SALES
OGDEN NEWELL & WELCH
1700 Citizens Plaza
500 W. Jefferson Street
Louisville, Kentucky 40202
(502) 582-1601
Counsel for

*Counsel of record

October 9, 1997

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY.

14 pp

PARTIES TO THE PROCEEDINGS

The petition accurately lists the parties to the proceeding.

Hilliard-Lyons, Inc. is the parent of J.J.B. Hilliard, W.L. Lyons, Inc. There are no non-wholly owned subsidiaries of respondent, J.J.B. Hilliard, W.L. Lyons, Inc..

TABLE OF CONTENTS

	PAGE
PARTIES TO THE PROCEEDING	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	5
A. This Case Presents No Important or Unsettled Questions of Federal Law	5
B. Hill Inferentialy Asks This Court to Overrule Gilmer	6
C. Hill Waived Her Right to Assert That Her Agreement to the U-4 Was Not Knowing or Voluntary	9
CONCLUSION	10

TABLE OF AUTHORITIES

PAGE

Cases:

Brown v *Board of Education,* 347 U.S. 483 (1954) 8
General Electric v *Gilbert,* 429 U.S. 125 (1976) 7, 8
Gilmer v *Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991) ..... passim
Hill v. *Hilliard, Ky.* App., 945 S.W. 2d 948 (1996) passim
Marbury v *Madison,* 5 U.S. (1 Cranch) 137 2 L.Ed. 60 (1803) 8
Nash v *Electro Space Systems,* 9 F.3d. 401 (CA5 1993) 6
Prudential Insurance Co. v. *Lai,* 42 F.3rd 1299 (CA 11, 1994) 9
Roe v. *Wade,* 410 U.S. 113 (1973) 8
Steele v *Offshore Ship Building, Inc.,* 867 F.2d 1311 (CA11, 1989) 6
United States v. *Mendenhall,* 446 U.S. 544, 551-1 (1980) 9
Youakim v. *Miller,* 425 U.S. 231, 234 (1976) 9

Statutes:

KRS 344.010 et seq. ..... passim
Civil Rights Act of 1964, as amended, 42 USC Section 2000(e)et seq. ..... passim
Federal Arbitration Act, 9 USC Section 1 (1994) . 8
Pregnancy Discrimination Act of 1978, 42 U.S.C. Sec. 2000e(k) 8

No. 97-450

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANE D. HILL, - - - - - - - - - - *Petitioner,*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN, - - - - - - *Respondents.*

On Petition For Writ Of Certiorari To The Kentucky Court Of Appeals

---

BRIEF IN OPPOSITION OF RESPONDENTS EXCEPT BRAB

COUNTERSTATEMENT OF THE CASE

Jane Hill's (Hill) petition seeks review of the holding of the Kentucky Court of Appeals that her employment claims against her employer, J.J.B. Hilliard, W.L. Lyons, Inc. (Hilliard-Lyons), must be arbitrated under *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)(*Gilmer*) because she executed a U-4 form agreeing to arbitrate all employment claims she may have against her employer. *Hill* v. *Hilliard*, Ky. App., 945 S.W. 2d 948 (1996).

There is no justification for this Court to review the opinion of the Kentucky Court of Appeals. This Court's decision in *Gilmer* effectively decided the only legitimate issues that Hill raises; Hill presents no compelling reason to revisit *Gilmer*; and, with this petition, Hill raises an issue for the first time that she did not raise with any of the lower courts.

Because this case was resolved by a Rule 12 Motion to Dismiss, the allegations of the complaint are taken as true. In her complaint, Hill seeks damages for alleged assault and battery, intentional infliction of emotional distress, and violations of Chapter 334 of the Kentucky Civil Rights Act for sexual harassment, employment related retaliation, and equal pay. Every claim against Hilliard-Lyons, Gilbert Pamplin, and James Stone relates to action or inaction they took as Hill's employer (or agents of the employer) after Hill accused Brab of raping her during a social outing while on a business trip to New York City.

Hilliard-Lyons is a brokerage firm and a member organization of the major stock exchanges. Pamplin, Stone, Brab and Hill are registered securities representatives. All were employed by Hilliard-Lyons. Brab resigned in late March, 1994. Stone, a former senior Vice-President, has retired. Pamplin is a consultant to the firm, having retired from his position as its chief executive officer. Only Hill is still employed. Hill was employed by Hilliard-Lyons as a stock broker on February 11, 1991. Later, she became vice-president of branch administration and marketing. Prior to her employment, Hill was required to register as a securities representative with regulatory organizations, including two stock exchanges, by completing and signing form U-4, "Uniform Application for Securities Industry Registration or Transfer."

In signing the U-4 form, Hill agreed to submit any dispute, claim, or controversy between herself and Hilliard-Lyons to arbitration. She pledged as follows:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm or customer or any other person, that is required to be arbitrated under rule, constitution or by-laws of the organization listed in Item 10 as may be amended from time to time and that any arbitration award entered against may be entered as a judgment in a Court of competent jurisdiction. (Petition at 4a).

The "organizations listed in Item 10" are the American Stock Exchange, the National Association of Securities Dealers and the New York Stock Exchange. Rule 347 of the New York Stock Exchange Rules provides:

> Any controversy between a registered representative and any member or member organization arising out of employment or termination of employment of such representative shall be settled by arbitration, at the instance of any such party, in accordance with our arbitration procedure described elsewhere in these rules. (Petition at 4a).

Hill alleges in her complaint:

1. On September 29, 1993, Hill and Brab, her supervisor, left Louisville on a business trip to attend a securities industry association convention in New York City. (Complaint, paragraphs 3, 17).
2. Sometime after midnight on October 1, 1993, following a social outing in New York City, Brab raped her. (Complaint, paragraph 19).
3. Nearly three weeks later on October 18, 1993, Hill told Stone of the alleged incident and requested that Hilliard-Lyons do something about it, as her employer. (Complaint, paragraph 23).
4. Stone harassed her in his office during this meeting. (Complaint, paragraph 24).
5. Hilliard-Lyons, Stone and Pamplin breached their duty to protect her and to refrain from taking retal-

iatory action against her in her employment by, among other things:

a. Not providing further job instructions and not separating Hill and Brab. (Complaint, paragraph 30).

b. Not meeting her expectations for a raise and bonus. (Complaint, paragraph 33).

c. Making threatening gestures. (Complaint, paragraph 48).

d. Forcing her to appear in public with Brab at a company function, or lose her job. (Complaint, paragraphs 41, 42).

All of these allegations against Hilliard-Lyons arose out of its relationship to Hill as her employer. Hill seeks back pay, bonuses, future earnings, and fringe benefits. Hill also seeks damages for an Equal Pay Act Violation.

After Hill filed her complaint in the Circuit Court for Jefferson County, Kentucky, all defendants moved to dismiss because Hill agreed to arbitrate any dispute "arising out of employment." The Circuit Court agreed and dismissed her action by an amended Order signed March 6, 1995.

On appeal, the Kentucky Court of Appeals affirmed the Circuit Court's decision as to Hilliard-Lyons, Pamplin and Stone finding that all of Hill's claims against them arose out of the employment relationship. As to Brab, the Court of Appeals held that what Brab is accused of doing - rape away from the office during non-working hours - is independent of the employment relationship. The Kentucky Supreme Court denied Hill's and Brab's Motions for Discretionary Review.

Hill did not allege in her complaint, nor did she file an affidavit, provide other evidence, or argue in any of the lower courts, that her waiver of her right to litigate her

claims against any of the defendants in favor of an arbitral forum was not knowing or voluntary.

REASONS FOR DENYING THE PETITION

A. This Case Presents No Important or Unsettled Questions of Federal Law.

Gilmer resolved the issue raised by Hill. As in *Gilmer*, Hill executed a U-4. Hill brought an action against her employer for sexual harassment, retaliation and violation of the Equal Pay Act. Before filing these claims here Hill filed charges with the Equal Employment Opportunity Commission alleging the same thing. Since the filing of the Circuit Court action here, Hill has filed further charges with the Equal Employment Opportunity Commission. Hill's attempts to distinguish her case from *Gilmer* would require this court to reverse the factual findings of the Jefferson Circuit Court and the Kentucky Court of Appeals that Hill's claims against Hilliard-Lyons arose out of her employment relationship. (Hill petition at 14-18). Hill states:

> The Court of Appeals analysis, that Hill's sexual harassment claims arise out of her employment because they 'relate' to the company's action taken in response to her report, is therefore wrong as a matter of law. Unlawful conduct can plainly 'relate to' a person's employment, but not constitute a dispute 'arising out of' that employment. (Hill Petition at 17).

This analysis is simply hair splitting. If Jane Hill had not been employed by Hilliard-Lyons, but was raped by Brab while both were on a social outing, she would not have any claim against Hilliard-Lyons. If Brab was not employed by Hilliard-Lyons, Hill would have no claim against Hilliard-Lyons. Likewise, had Hill never reported to Hilliard-Lyons officials that she had been allegedly raped

by Brab, her claim against Hilliard-Lyons would fail. *Nash v Electro Space Systems,* 9 F.3d 401(5th Cir., 1993).[1]

All of Hill's claims against Hilliard-Lyons, Stone, and Pamplin are clearly related to and arise out of her employment relationship with them.[2] Hill's separate claim that Hilliard-Lyons performed an inadequate investigation and retaliated against her can only arise out of her employment. The fact that Hilliard-Lyons was investigating it at all was only because both she and Brab were employed by Hilliard-Lyons. The underlying rape allegation against Brab does not mean that Hill's claims against Hilliard-Lyons arose out of that rape. Absent the employment relationship, Hill's claims against Hilliard-Lyons don't exist. The lower court's factual findings in this regard should not be disturbed.

B. Hill Inferentially Asks This Court to Overrule *Gilmer*

Knowing that it is unlikely that this Court can be convinced to overrule a precedent made just six years ago, Hill doesn't specifically ask the Court to overrule *Gilmer*. But, Hill inferentially invites the Court to do so. Hill argues that "this case presents an important and unsettled question of federal law...," and further states that "the legal status of employer mandated arbitration of employ-

---

[1]It is doubtful that a single allegation of non-consensual sex by an employee against her supervisor following an evening of drinking away from the work place constitutes actionable sexual harassment by the employer given the almost impossible task of proving that the alleged rape fell within the scope of the supervisor's authority. *Steele* v. *Offshore Ship Building, Inc.* 867 F.2d 1311 (11th Cir., 1989).

[2]Indeed, Hill alleges that after she reported the alleged rape to Stone, he made certain sexually based remarks to her in his office clearly arising out of employment.

ment disputes is and will remain unsettled." (Petition at 5).[3] Remarkably, in the very next sentence Hill states that "[f]ollowing *Gilmer*, the Courts have with virtual unanimity enforced mandatory arbitration of employment disputes in a variety of situations." (Petition at 5). If the courts have been unanimous, the question arises what is unsettled other than the constantly changing political landscape? At the very end of the same section, Hill asks the question she wants the Court to resolve: "... this Court should promptly address the question of whether mandatory arbitration agreements are permissible as a condition of employment under the FAA." (Petition at 10). For securities industries employees, this Court answered this question in *Gilmer*.

To support her position that the Court should revisit Gilmer, Hill cites a litany of reports from organizations that disagree with this Court's holding in *Gilmer*. Hill cites a proposal by the National Association of Securities Dealers to amend the U-4 form by permitting employees to exercise a choice between arbitration and litigation of employment related disputes. But Hill doesn't mention that New York Stock Exchange Rule 347 also requires arbitration of disputes such as Hill's. The Equal Employment Opportunity Commission (EEOC) also disagrees with this Court's holding in *Gilmer*. Of course this is not the first time that the EEOC has disagreed with this Court. See generally, *General Electric Company v Gilbert*, 429 U.S. 125, 140-145 (1976). Additionally, Hill cites criticism of mandatory arbitration from the National Academy of Arbitrators, the Dunlap Commission, and "numerous arbitrators."

---

[3]Hill engages in a bit of legerdemain by characterizing the U-4 as employer mandated arbitration of employment disputes. Hilliard-Lyons is not the author of the U-4. Hill executed the U-4 to secure a registration with regulatory agencies.

Disagreement with this Court's opinion in *Gilmer* does not make the law "unsettled." It creates no compelling justification for this Court to revisit *Gilmer*. After all, the political opposition arrayed against this Court's decision in *Gilmer* is hardly comparable to the political firestorms whipped up by prior decisions of this Court.[4]

In any event, political opposition to a decision of this Court does not justify changing the law. The Court doesn't take easy cases, nor does it decide cases by licking a finger and putting it to the wind. Those who disagree with this Court's decision have a remedy with the legislature. Many interest groups passionately disagreed with this Court's decision in *General Electric Company v Gilbert*, supra. Those interest groups convinced Congress to change the law, which it did with the enactment of the Pregnancy Discrimination Act of 1978, 42 U.S.C. Sec. 2000e(k).

Indeed, this Court decided *Gilmer* on May 13, 1991. Just six months later, on November 21, 1991, Congress enlarged the remedies available to complainants in cases of employment discrimination. 42 U.S.C. Sec. 1981a. As part of that same enactment, Congress amended Title VII of the Civil Rights Act of 1964 by: 1) easing the burden of proof in disparate impact cases, 42 U.S.C. Sec 2000e-2(k); 2) prohibiting the adjustment of test scores or using different scores based on impermissible criteria, 42 USC Sec 2000e-2(l); 3) making the consideration of race, color, sex and national origin in employment practices impermissible, even if other legitimate motivating factors existed, 42 USC Sec 2000e-2(m); and, 4) setting specific standards for challenges to employment practices that are mandated by consent judgments or other orders of lower courts, 42 USC 2000e-2(n).

---

[4]*Marbury v Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803); *Brown v Board of Education*, 347 U.S. 483 (1954); *Roe* v. *Wade*, 410 U.S. 113 (1973).

At any rate, Congress could have acted; it has not done so. There are no compelling reasons for this Court to revisit its decision in *Gilmer*. As Hill points out, the lower courts have a uniform interpretation and understanding of what this Court's decision in *Gilmer* meant and how it should be applied. There is no split among the lower appellate courts on any important issue in this case.

C. Hill Waived Her Right to Assert That Her Agreement to the U-4 Was Not Knowing or Voluntary.

At pages 9 and 10 of her petition, Hill argues that the waiver of her statutory right must be both "knowing and voluntary" citing *Prudential Insurance Co.* v. *Lai*, 42 F. 3rd 1299 (11th Cir., 1994), cert. denied 116 S.Ct. 61 (1995). Before filing this petition Hill never claimed that her waiver of her right to a judicial forum was not knowing or involuntary. It was not alleged in her complaint filed in Circuit Court. In the briefs filed with the circuit court and the Kentucky Court of Appeals she does not argue or assert that she did not know and did not voluntarily assent to waiving her right to a judicial forum instead of an arbitral one. None of the lower courts addressed the issue that she now raises for the first time with this Court - that her waiver of her right to a judicial forum in the U-4 was not knowing or voluntary. This Court traditionally refuses to consider issues that have not been raised or argued in the lower court, and should decline the opportunity to do so here. *Youakim v Miller*, 425 U.S. 231, 234 (1976); *United States v Mendenhall*, 446 U.S. 544, 551-2 (1980).

There are other compelling reason why this case would be an inappropriate vehicle for this Court to announce standards for determining the effectiveness of the U-4's waiver. In the U-4 Jane Hill executed, which was a part of the record below, she indicates that she was a paralegal for a law firm of Barnett and Alagia. She was an instruc-

tor in corporate law at Sullivan Junior College. Hill's husband is a lawyer. She is hardly the type of person who can assert that her waiver is not voluntary. For all of the aforesaid reasons, Hill's petition for writ of certiorari should be denied.

CONCLUSION

The waiver of a judicial forum in favor of an arbitral one was not mandated by an agreement drafted or required by Hilliard-Lyons. It is a document that must be filled out if Jane Hill or any other person wishes to work in the securities industry and to trade on the New York Stock Exchange. As held in *Gilmer,* the U-4's agreement to arbitrate effectively waives the right to use a judicial forum for employment related disputes. Hill reported the alleged rape to her employer, sought protection from her employer, alleged that her employer retaliated, failed to investigate, and violated the Equal Pay Act. Thus, all of Hill's claims against Hilliard-Lyons, Stone and Pamplin arise out of her employment relationship with them. Hill did not argue in the lower court that her execution of the U-4 was not a knowing and voluntary waiver of her right to a judicial forum in favor of an arbitral one.

For the forgoing reasons, the petition for writ of certiorari should be denied.

JOHN T. BALLANTINE, JR.*
WALTER LAPP SALES
OGDEN NEWELL & WELCH
1700 Citizens Plaza
500 W. Jefferson Street
Louisville, KY 40202
(502) 582-1601

*Counsel of record
October 12, 1997

Supreme Court U.S.
FILED
OCT 14 1997
CLERK

No. 97-450

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANE D. HILL, - - - - - - - - - *Petitioner,*

versus

J.J.B. HILLIARD, W.L. LYONS, INC., Et Al., - - - - - - - - - *Respondents.*

On Petition for Writ of Certiorari
To the Kentucky Court of Appeals

RESPONDENT BRAB'S BRIEF IN OPPOSITION

ELEANORE M. GARBER
First Trust Centre, 600N
200 S. Fifth Street
Louisville, Kentucky 40202
(502) 585-5100
Counsel for Respondent,
W. William Brab

October 14, 1997

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3351, LOUISVILLE, KY.

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
The question presented is highly misleading, biased and fails to state a clear federal issue	2
REASONS FOR DENYING THE WRIT	3
A. This Court is not the proper forum to promulgate a new national policy rejecting all mandatory arbitration	3
B. The issue of "knowing and voluntary" waiver of a judicial forum was never raised in the Kentucky courts	5
C. This Petition presents no unsettled Question of Federal Law	7
CONCLUSION	7

TABLE OF AUTHORITIES

	PAGE
Cases:	
Dean Witter Reynolds Inc. v. *Byrd*, 470 U.S. 13 (1985)	4
Gilmer v. *Interstate/Johnson Lane Corp.* 500 U.S. 20 (1991)	4,5,7
Hill v. *California*, 401 U.S. 797 (1971)	6
In re Lamkin, 355 U.S. 59 (1957)	6
Keene Corp. v. *United States*, 508 U.S. 200 (1993)	5
McGoldrick v. *Compagnie Generale*, 309 U.S. 430 (1940)	6
Perry v. *Thomas*, 482 U.S. 480 (1987)	4,6
Prudential Insurance Co. v. *Lai* 42 F.3d 1299 (12th Cir., 1994) cert. denied, 116 S.Ct. 61 (1995)	6
Regional Jail Authority v. *Tackett*, Ky., 770 S.W. 2d 225 (1989)	6
Scherk v. *Alberto-Culver Co.*, 417 U.S. 506 (1974)	4
Smoot's Case, 15 Wall 36 (1873)	5
Southland Corp. v. *Keating* 465 U.S. 1 (1984)	4
Transportation Cabinet v. *Cassity*, Ky., 912 S.W. 2d 48 (1995, Amended, 1996)	6
Williams v. *Georgia*, 349 U.S. 75 (1955)	6
Statutes Cited:	
Federal Arbitration Act (FAA), 9 U.S.C. sec. 1 *et seq.*	3,4,5
28 U.S.C. sec. 1257	6
28 U.S.C. sec. 1500	5
Age Discrimination in Employment Act (ADEA) 29 U.S.C. sec. 621	4

No. 97-450

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANE D. HILL, - - - - - - - - - - *Petitioner,*

v.

J.J.B. HILLIARD, W.L. LYONS, INC., Et Al., - *Respondents.*

On Petition For Writ Of Certiorari To The Kentucky Court Of Appeals

---

RESPONDENT BRAB'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This petition is one of two petitions seeking this Court's review of a decision of the Kentucky Court of Appeals. The Kentucky trial court below dismissed claims of Jane Hill, petitioner, ("Hill", hereinafter) of assault and battery and intentional infliction of emotional distress along with Kentucky statutory claims of discrimination in employment against all respondents, including W. William Brab, her supervisor ("Brab" hereinafter). That court determined that **all** claims arose out of Hill's employment and were subject to mandatory arbitration pursuant to the Federal Arbitration Act. The Court of Appeals vacated the trial court order as to dismissal of the claims of assault and battery and false imprisonment against Brab and remanded same

for trial, but affirmed the remainder of the trial court's order.

In a separate petition (No. 96-459), Brab seeks review of a portion of the Court of Appeals decision in view of conflicting state and federal court decisions determining which types of claims against a supervisor should be subject to mandatory arbitration. In this petition, Hill objects to the policy of mandatory arbitration in general and contests the conclusion of the Kentucky Court of Appeals that all of Hill's claims against the employer and most of the claims against her supervisor arose out of her employment.

As set forth below, there is no cause for this Court's review of Hill's contentions. The question presented is misleading, biased and fails to state a clear federal issue. Furthermore, this Court is not the proper forum to promulgate a new national policy rejecting all mandatory arbitration. Additionally, the issue of "knowing and voluntary" waiver of a judicial forum, obliquely smuggled into this petition, was **never** raised in the Kentucky trial or appellate courts. Finally, the lower federal courts and states' highest courts have enforced, with virtual unanimity, mandatory arbitration agreements in the context of statutory civil rights claims of discrimination in employment.

The question presented is highly misleading, biased and raises no clear federal issue.

Petitioner has presented a highly misleading and loaded question. No citizen of the state of Kentucky or of the United States who claims to have been raped waives a judicial forum by reporting the allegation to an employer. Rape is a serious crime. Hill had unrestricted access to the criminal justice system and a right to a jury trial and chose not to avail herself of same.

The question as presented suggests that Hill is a proven victim and that Brab has been found criminally or civilly culpable of rape. There has been not been one scintilla of evidence presented in any forum supporting any of Hill's allegations, just as no evidence has been adduced to date supporting Brab's allegation of slander *per se*.

Hill's question as framed fails to notify this Court of any specific federal statute, rule or regulation underpinning a clear federal issue requiring this Court's attention.

REASONS FOR DENYING THE WRIT

A. This Court is not the proper forum to promulgate a new national policy rejecting all mandatory arbitration.

Respondent Brab submits that this case **does** present an important issue concerning the application of the Federal Arbitration Act (FAA), 9 U.S.C. sec. 1 *et seq.*, to claims brought against a supervisor during the course of an employment relationship. This Court is not the proper forum, however, to address the apparent issue discussed in **this** petition.

Hill's main thrust herein appears to be a frontal assault on sections 2, 3, and probably section 4 of the FAA which provide for the enforcement, through the state and federal courts, of mandatory arbitration agreements within the coverage of the Act. Hill does not suggest or imply that the FAA is unconstitutional on its face or in its applicability to this case. Instead, she alludes to "a vigorous and growing rejection of mandatory arbitration" **as a policy** by such organizations as the National Association of Security Dealers (NASD), the Equal Employment Opportunity Commission (EEOC), the National Academy of Arbitrators and others (Petition, pp. 5-7). Hill argues, rhetorically, that voluntary, post-dispute arbitration is "probably faster and cheaper" than mandatory arbitration and lacks the procedural disadvantages to employees versus employers (Peti-

tion, pp. 8-10.) It is difficult to ascertain from the petition exactly what adjudicatory function she asks this Court to perform in furthering the purported growing consensus against all mandatory arbitration.

The FAA was enacted by Congress in 1925, 43 Stat. 883, and then reenacted and codified in 1947 as Title 9 of the United States Code. This Court stated in *Perry* v. *Thomas,* 482 U.S. 483,489-490, (1987) as follows:

> As we stated in *[Southland Corp.* v.*] Keating,* [465 U.S. 1, 10, 16 (1984)] "in enacting sec. 2 of the [FAA] Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judi- cial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. [cites omitted]. Section 2, therefore, **embodies a clear federal policy of requiring arbitration** unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable "upon such grounds as exist at law or in equity for the revocation of any contract."
>
> (Emphasis added).

In *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20 (1991) this Court held that the FAA compels enforcement of arbitration clauses in a securities registration agreement involving a claim of discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. sec. 621. In that decision, this Court noted that the purpose of the enaction of the FAA was "to reverse the long-standing judicial hostility to arbitration agreements that had existed at common law and had been adopted by the American courts . . .", Id at 1651, citing *Dean Witter Reynolds Inc.* v. *Byrd,* 470 U.S. 213, 219-220 (1985) and *Scherk* v. *Alberto-Culver Co.,* 417 U.S. 506, 510 n.4 (1974). This Court has explcitly recognized the prerogative of Congress

to determine national policy concerning enforcement of arbitration agreements and has done so in more cases than can be cited here.

Accordingly, Brab submits that the proper forum for Hill and for others who now oppose mandatory arbitration as a policy is Congress. Justice David Souter wrote the following in *Keene Corp* v. *United States,* 508 U.S. 200, 217 (1993) (decision affirming the dismissal, for lack of jurisdiction, of a complaint filed in United States Court of Federal Claims):

> We have said nothing until now about [Plaintiff's] several policy arguments, and now can only answer that Keene addresses the wrong forum. It may well be, as Keene argues that [28 U.S.C. sec. 1500 (1988 ed., Supp. IV] operates in some instances to deprive plaintiffs of an opportunity to assert rights that Congress has generally made available to them. . . . But the "proper theater" for such arguments, as we told another disappointed claimant many years ago "is the halls of Congress for that branch of government has limited the jurisdiction of the Court of Claims." *Smoot's Case,* 15 Wall 36, 45 (1873).

The authority of a state or federal court to enforce an arbitration agreement derives from the FAA. The proper branch of government for Hill to seek redress in repealing all or part of the FAA is "the halls of Congress", not this Court.

B. The Issue of "knowing and voluntary waiver" of a judicial forum was never raised or decided in the state courts.

The petition states that this Court's decision in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) did not address the issue of a knowing and voluntary waiver of an employee's right to go to court (Petition, p. 9). Neither has Petitioner until now. While this precise issue was

properly raised and addressed in *Prudential Insurance Co.* v. *Lai,* 42 F. 3d 1299 (12th Cir., 1994), cert. denied 116 S. Ct. 61 (1995), cited in the petition, this petitioner never raised this issue in the Kentucky courts. She has obliquely attempted to smuggle a "knowing and voluntary waiver" issue into this petition (petition, pp. 9-12) but this Court cannot consider it here for the first time. Reaffirming its longstanding practice in *Perry* v. *Thomas,* 482 U.S. 480, 493 (1987), this Court declined to address the question of whether an arbitration agreement constituted an unconscionable, unenforceable contract of adhesion where the issue was not decided by the lower courts.

A federal claim cannot be considered by this Court, under 28 U.S.C. sec. 1257, unless it has been either raised in the state court or considered and resolved by the state court. *McGoldrick* v. *Compagnie Generale,* 309 U.S. 430, 434 (1940); *Hill* v. *California,* 401 U.S. 797, 805 (1971). A litigant must follow state procedures in raising the federal question. *In re Lamkin,* 355 U.S. 59 (1957). When required by state practice, the federal question must be raised before the trial court. *Williams* v. *Georgia,* 349 U.S. 375, 382-83 (1955.) The rule in Kentucky is that the Kentucky appellate courts are without authority to review issues not raised in or decided by the trial court. *Regional Jail Authority* v. *Tackett,* Ky., 770 S.W. 2d 225, 228 (1989); *Transportation Cabinet* v. *Cassity,* Ky 912 S.W. 2d 48, 51 (1995, amended, 1996).

Hill never complained at the trial court level, either by sworn testimony or affidavit, that she did not voluntarily or knowingly waive her right to go to court. Furthermore, she never raised this issue before the Kentucky Court of Appeals or the Kentucky Supreme Court. The Kentucky courts have been afforded no opportunity to consider this issue and it is not properly before this court.

C. This Petition has not presented an unsettled question of Federal law.

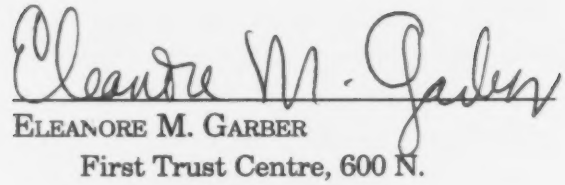
Following *Gilmer,* the Courts have overwhelmingly enforced mandatory arbitration of employment disputes involving statutory civil rights claims and other claims, as petitioner explicitly concedes (petition, p. 5). Petitioner cites no conflict in the courts, either within the federal appeals courts or among the states' highest courts or between the federal and state courts. The Kentucky Court of Appeals decision, upholding the deferral to arbitration of all of the statutory claims against her supervisor and all of her claims against her employer, was in accordance with the holding of *Gilmer* and its many progeny.

Petitioner first sought redress for all of her claims before the Equal Employment Opportunity Commission (EEOC). The sole domain of the Equal Employment Opportunity Commission is claims of discrimination arising in employment. Subsequently, Petitioner filed this action in the Kentucky circuit court. She now submits that **none** of the claims she brought before the EEOC arose out of her employment. Her complaint belies her present posture. The courts have virtually, uniformly upheld mandatory arbitration of the types of claims raised in this action and the petition should be denied.

CONCLUSION

Because this petition has raised nothing for this Court to decide, the petition should be denied.

Respectfully submitted,



ELEANORE M. GARBER
First Trust Centre, 600 N.
200 South Fifth Street
Louisville, KY 40202
(502) 585-5100
Counsel for Respondent,
W. William Brab

Dated: October 14, 1997

(4)

No. 97-450

Supreme Court, U.S.
FILED
OCT 30 1997
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

JANE D. HILL, - - - - - - - - *Petitioner,*

versus

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN, - - - - *Respondents.*

On Petition for Writ of Certiorari
To the Kentucky Court of Appeals

PETITIONER'S REPLY BRIEF

GARY L. THEURER
15005 Spring Meadow Drive
Germantown, Maryland 20767
(301) 977-5779
Counsel of Record

IVAN H. RICH, JR.
RICH & D'AMBROSIO, P.S.C.
3044 Breckinridge Lane, Suite 103
Louisville, Kentucky 40220
(502) 493-0503
Counsel for Petitioner

October 30, 1997

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

12pp

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
1. THE ISSUE OF KNOWING AND VOLUNTARY WAIVER OF A JUDICIAL FORUM UNDER THE FAA IS UNRESOLVED	3
2. A MAJORITY OF THIS COURT HAS VOTED IN SEPARATE CASES NOT TO REQUIRE ARBITRATION UNDER THE FAA OF STATE COURT ACTIONS	4
3. *GILMER* DOES NOT FORECLOSE CONSIDERATION OF THE ISSUE RAISED IN THE PETITION	7
4. THE ISSUE OF KNOWING AND VOLUNTARY WAIVER CAN PROPERLY BE CONSIDERED BY THIS COURT	8
CONCLUSION	9

TABLE OF AUTHORITIES

PAGE

Cases:

Allied-Bruce Terminix Companies, Inc. v. *Dobson*, 513 U.S. ____, 115 S.Ct. 834 (1995) ... 5

Edmondson v. *Pennsylvania National Insurance Co.*, KY 781 S.W. 2d 753 (1989) 4

Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) ..... passim

Illinois v. *Gates*, 462 U.S. 213 (1983) 8

Perry v. *Thomas*, 482 U.S. 483 (1987) 3, 5

Prudential Insurance Co. v. *Lai*, 42 F.3d 1299 (11th Cir. 1994), cert. denied 116 S.Ct. 61 (1995) 4

Southland Corp. v. *Keating*, 465 U.S. 1 (1984) 4, 5, 6, 8

Volt Information Sciences, Inc. v. *Board of Trustees of Leland Standford Junior Univ.*, 489 U.S. 468 (1989) 4

Yee v. *Escondido*, 503 U.S. 519 (1992) 8

Statutes:

Federal Arbitration Act, 9 U.S.C. §2 (1994) 3, 4, 5

Kentucky Revised Statutes 336.700 ..... 5, 6

Kentucky Revised Statutes 417.050 6

Miscellaneous:

A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, Disp. Res. J. Oct-Dec. 1995 2

No. 97-450

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

JANE D. HILL, - - - - - - - - - - *Petitioner,*

v.

J.J.B. HILLIARD, W.L. LYONS, INC.;
WOLFGANG WILLIAM BRAB;
JAMES C. STONE, III; and
GILBERT L. PAMPLIN - - - - - - - *Respondents.*

On Petition for Writ of Certiorari
To the Kentucky Court of Appeals

PETITIONER'S REPLY BRIEF

INTRODUCTION

In *Gilmer*[1], this Court held that a securities industry registration application requiring arbitration of any controversy "arising out of employment" was a contract under the Federal Arbitration Act ("FAA") and operated to require arbitration of a statutory civil rights claim. The opinion did not discuss whether Mr. Gilmer knowingly and voluntarily waived his right to a judicial forum, but "left for resolution in specific cases" the issue of unequal bargaining power between the parties, observing that Gilmer

---

[1] *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

was an experienced businessman who did not claim he was coerced or defrauded. 500 U.S. at 33

In the present case, Hill petitions this Court to examine the issue, decided but not discussed in *Gilmer*, of whether mandatory predispute arbitration of employment disputes is permissible under the FAA. Hill's petition argues that it is impossible for an employee either knowingly to waive a claim before it has arisen or voluntarily agree to arbitration if it is imposed as a condition of getting or keeping a job. (Pet. at 9-11) Further, it contends that the response to employer imposed arbitration has been increased litigation over arbitrability issues and virtually unanimous criticism by professional arbitrators and the civil rights community. (Pet. at 5-8) The analytical core of the rejection of *Gilmer* by these groups, which are necessary for the practical success of arbitration as alternative dispute resolution, is that the viability of the process rests on its truly voluntary acceptance by both employers and employees. Systems designed exclusively by employers and imposed on employees simply cannot be workable private mechanisms to resolve employment disputes. Mandatory arbitration will continue to be challenged in court so long as those who are accused of wrongdoing are free both to design and impose the system to decide the claim. Foxes are poor guardians of hen houses.

Ironically, one of the developments following *Gilmer* was the development of the Protocol reflecting a broad based consensus on the procedures necessary for effective arbitration of employment disputes. (Pet. at 8) As yet, however, employers have been slow to accept the procedures set forth in the Protocol and there is no effective way to compel such acceptance.

With this background, Hill's petition suggests that voluntary arbitration, agreed to after a dispute has arisen, is the only viable solution. It is just as efficient as manda-

tory arbitration and has the advantage of eliminating arbitrability disputes. (Pet. at 10-12) The proponents of mandatory arbitration were challenged by Hill's petition to articulate any reason why it was preferable, other than it retained a real or perceived procedural advantage for the employer and resulted in reducing the employer's damages. (Pet. at p. 11 n. 21)

Astonishingly, neither brief in opposition even attempts to refute Hill's argument that mandatory arbitration is unworkable and voluntary arbitration is the preferable alternative. Instead, Respondent Brab argues (Opp. at 3-5) that the FAA permits only mandatory arbitration. The Hilliard Respondents argue (Opp. at 6-9) that *Gilmer* forecloses consideration of whether mandatory arbitration is required under the FAA. Both briefs in opposition assert that Hill's voluntary arbitration argument should not be considered because it was not presented to the lower courts. These points in opposition are considered in order.

1. THE ISSUE OF KNOWING AND VOLUNTARY WAIVER OF A JUDICIAL FORUM UNDER THE FAA IS UNRESOLVED

Respondent Brab concedes that the issue of a knowing and voluntary waiver of an employee's right to a judicial forum has never been addressed by this Court. (Opp. at 5-6) Nonetheless, he argues that this Court's statement that Section 2 of the FAA "embodies a clear federal policy *requiring* arbitration"[2] (emphasis added) precludes a system of voluntary arbitration.

The flaw in Brab's argument is that the quoted language is taken out of context and the remaining language in FAA Section 2 is ignored. Arbitration is not required if the contract is "revocable upon such grounds as exist at

---

[2] *Perry* v. *Thomas*, 482 U.S. 483, 489-90 (1987).

law or in equity." Clearly, as Brab concedes, both federal and Kentucky law provide for the revocability of the contract if the waiver was not knowing and voluntary. *Prudential Insurance Co.* v. *Lai*, 42 F.3d 1299 (11th Cir. 1994), cert. denied 116 S.Ct. 61 (1995); *Edmondson* v. *Pennsylvania National Insurance Co.*, Ky. 781 S.W.2d 753, 755 (1989).

The basis for this Court's decisions implementing the FAA is that agreements to arbitrate should be "as enforceable as other contracts, but not more so." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Standford Junior Univ.*, 489 U.S. 468, 478 (1989) That the FAA requires arbitration pursuant to traditional contract law does not foreclose the concededly undiscussed issue Hill seeks to have this Court address: was her waiver of a judicial forum knowing and voluntary so that the agreement requiring arbitration was not revocable?

2. A MAJORITY OF THIS COURT HAS VOTED IN SEPARATE CASES NOT TO REQUIRE ARBITRATION UNDER THE FAA OF STATE COURT ACTIONS

The genesis of the preemptive effect of the FAA in state court actions is *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984). There the Court held that in enacting Section 2 of the FAA, Congress created a body of substantive law, under the Commerce Clause, applicable to both federal and state courts. Chief Justice Rhenquist and Justice O'Connor dissented on the ground that the FAA by its terms is applicable only to federal courts.[3] Justice Stevens dissented separately on the ground that the exception based "on such grounds as exist in law or equity" was broad enough to permit state resolution restricting arbitration of various claims.[4]

---

[3] 465 U.S. at 21.

[4] 465 U.S. at 17.

Subsequently, in *Perry* v. *Thomas*, 482 U.S. 483 (1987) the Court held that Section 2 of the FAA preempted a California statute precluding arbitration of wage collection actions. Justices Stevens and O'Connor dissented for the reasons stated in *Southland*.[5]

More recently, in *Allied-Bruce Terminix Companies, Inc.* v. *Dobson*, 513 U.S. ____, 115 S.Ct. 834 (1995) the Court held that an Alabama statute making predispute arbitration agreements unenforceable was preempted by the FAA so as to require arbitration of a claim brought in state court for termite damage. Justices Thomas and Scalia dissented, essentially for the reasons stated in the dissents in *Southland*, that Congress never intended to apply the FAA to state courts or to require specific enforcement of an arbitration clause in the face of a contrary state statute.[6] However, Justice O'Connor concurred in the Court's opinion on *stare decisis* grounds, even though she "continue[d] to believe" *Southland* was wrongly decided.[7]

Thus, a majority[8] of this Court has voted, albeit in different cases, against applying the FAA to preempt state court actions.

The Kentucky Statutes are clear that, even though arbitration generally is favored, mandatory arbitration of employment disputes is prohibited. KRS 336.700 prohibits employers from requiring an employee to waive any statu-

---

[5] 482 U.S. at 493-4.

[6] 115 S.Ct. at 845.

[7] 115 S.Ct. at 843-4.

[8] Chief Justice Rhenquist, Justices Stevens, O'Connor, Scalia and Thomas.

tory claim.[9] In addition, KRS 417.050 specifically removes from the Uniform Arbitration Act "arbitration agreements between employers and employees."[10]

It is respectfully submitted that this case provides the Court with an appropriate vehicle to reexamine *Southland*. There is surely little justification for a federal statute to require arbitration of state civil rights and common law tort claims arising out of an alleged rape. There is even less justification to require arbitration of those claims when a majority of this Court has rejected the decisional basis for the application of the FAA.

The unstated reason for this Court's enchantment with the FAA is its usefulness in reducing the caseload burden in the federal courts. It may well be that mandatory arbitration is an effective procedure to reduce this burden. There is no justification, however, for this Court to impose the same procedure on the fifty state courts, which may or may not be confronted with the same problem. Indeed, in the instant case Kentucky has gone out of its way to require a judicial forum for the dispute. If any of the state

---

[9] KRS 336.700 provides: Notwithstanding any provision of the Kentucky Revised Statutes to the contrary,no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revisd Statutes or any federal law.

[10] KRS 417.050 provides: A written agreement to submit any existing controversy to arbitration or a provision in written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract. This chapter does not apply to arbitration agreements between employers and employees or between their respective representatives and does not apply to insurance contracts.

courts have a caseload problem, each state should be free to deal with it in its own way.

In *Gilmer*, this Court emphasized that a plaintiff's legal right to press his claim was undiminished and the only difference was the forum in which the claim was heard. There may be justification for requiring arbitrators to hear cases which would otherwise be brought in federal courts, but there is no good reason why an arbitral forum imposed by a defendant should displace a state court.

3. *GILMER* DOES NOT FORECLOSE CONSIDERATION OF THE ISSUE RAISED IN THE PETITION

Hill's petition argues (Pet. at 10) that the rejection of mandatory arbitration by professional arbitration organizations and the EEOC, whose support is necessary for the success of any private system of dispute resolution, means that court challenges to mandatory arbitration will continue. The Hilliard Respondents counter that the lower courts have uniformly required arbitration pursuant to *Gilmer* and the law is therefore not unsettled.

This response misses the point. The goal is to have less court litigation. The practical effect of mandatory arbitration after *Gilmer* has been increased challenges to arbitration and other procedural issues which are clearly going to continue. Given this state of affairs, Hill's petition raises the pertinent question whether employer designed and imposed arbitration systems are a necessary part of private employment dispute resolution. If the mandatory aspect of the system is unnecessary and counterproductive, it should be eliminated just as it was created: by judicial fiat.

The suggestion by the Respondents that Hill's arguments are properly addressed to Congress, not this Court, is also nonresponsive. They concede the issue of knowing

and voluntary waiver was not discussed in *Gilmer*. Why, then, should Congress address an issue that was decided, though not really considered by this Court? The current expansive reach of the FAA is entirely a creation of this Court. If it is not working, this Court should fix the problem rather than leave the job to Congress.

4. THE ISSUE OF KNOWING AND VOLUNTARY WAIVER CAN PROPERLY BE CONSIDERED BY THIS COURT

Both Brab and the Hilliard Respondents contend that Hill's petition runs afoul of the rule that, in reviewing state court judgments, this Court will not consider claims not raised or addressed below. *See Illinois* v. *Gates*, 462 U.S. 213, 218-20 (1983)

The flaw in Respondents' contention is that it ignores the difference between Hill's claim and the arguments she has advanced to support that claim. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *Escondido*, 503 U.S. 519, 534 (1992)

Hill's consistent federal claim has unquestionably been that the FAA under *Gilmer* does not compel arbitration of state court civil rights and tort claims. The Kentucky Court of Appeals opinion was squarely based on its understanding of the FAA and *Gilmer*. (Petition for Certiorari, Appendix 5A-9A) There can be no doubt the federal claim was raised and decided below.

It may well be that Hill's arguments to the lower courts were more narrowly tailored. The broader arguments raising issues decided but not discussed in *Gilmer*, and inviting a reexamination of *Southland* could not realistically have been decided below and are properly addressed to this Court.

CONCLUSION

This Court's decisions have expanded the FAA to preempt state law prohibiting arbitration of claims for wage payment and termite damage. They permit employers to design and impose involuntary arbitration systems on employees for the conceded purpose of avoiding the potential monetary exposure inherent in a judicial forum. These decisions should not be further expanded to require mandatory arbitration of state court civil rights and tort claims arising out of rape.

Respectfully submitted,

GARY L. THEURER, ESQ.
15005 Spring Meadow Drive
Germantown, Maryland 20767
(301) 977-5779
Counsel of Record

IVAN H. RICH, JR., ESQ.
RICH & D'AMBROSIO, P.S.C.
3044 Breckenridge Lane, Suite 103
Louisville, Kentucky 40220
(502) 493-0503
Counsel for Petitioner, Jane D. Hill

October 30, 1997